

No. 12727

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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CALIFORNIA STATE BOARD OF EQUALIZATION,

*Appellant,*

*vs.*

GEORGE T. GOGGIN, Trustee in Bankruptcy of the Estate  
of West Coast Cabinet Works, Inc.,

*Appellee.*

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## APPELLANT'S OPENING BRIEF.

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## TOPICAL INDEX

	PAGE
Preliminary jurisdictional statement.....	1
Statement of the case.....	2
Argument .....	3
Part I: Issues raised in light of the facts established by the record .....	3
A. Pertinent facts .....	3
B. The District Court's findings are not supported by the record .....	8
C. Issues raised in light of the facts established by the record .....	10
D. Specification of errors.....	11
E. It is elementary that a state cannot be sued without its consent .....	11
F. Neither the State of California nor its duly authorized taxing agency, the California State Board of Equaliza- tion (appellant herein) was a party to the bankruptcy proceeding involving the West Coast Cabinet Works, Inc. ....	12
G. The proceedings below in effect amounted to a suit against appellant, a duly constituted agency of the State of California .....	12
H. The State of California has specifically denied its con- sent to procedure by way of injunction, mandamus, or other legal or equitable process to prevent or enjoin the collection of any tax under the California Sales and Use Tax Law.....	13
I. Federal District Courts do not have jurisdiction to en- join the collection of state taxes under a valid taxing statute where an adequate remedy exists under state law .....	13

	PAGE
J. In any event the taxes in question were properly imposed upon appellee.....	15
1. Nature of the tax.....	15
2. Appellee was within the purview of the taxing statute .....	17
3. The gross receipts derived by appellee from the sales involved were properly included in the measure of his sales tax liability.....	20
Part II: Analysis of the opinion below.....	21
A. Preliminary statement .....	21
B. The facts upon which the opinion below was predicated .....	21
C. Applicability of Section 960, 28 U. S. C., formerly Section 124a of that title.....	22
D. Trustees in bankruptcy are subject to the California Sales and Use Tax Law even though they engage solely in liquidation activities if they make a sufficient number of retail sales.....	26
E. Trustees in bankruptcy making liquidation sales only are retailers within the purview of the California Sales and Use Tax Law if the sales are sufficient in scope and number.....	29
F. There is no federal constitutional or statutory prohibition against the imposition of a non-discriminatory state tax upon trustees in bankruptcy.....	30
G. Although it is not disputed that the California sales tax is a tax imposed on the seller, the practical operation of the state taxing statute must be considered.....	35
H. Principles of statutory construction should not be loosely applied to support a predetermined conclusion .....	37

I. Compliance with the California Sales Tax statute by trustees in bankruptcy would not give appellant a priority over other administrative expenses.....	41
J. Although the term "trustees" rather than "trustees in bankruptcy" is used in Section 959, 28 U. S. C., it is well established that that term includes trustees in bankruptcy .....	42
K. Miscellaneous points in sequence.....	43
L. With particular reference to administrative construction .....	45
M. With further reference to the referee's jurisdiction.....	47
Conclusion .....	48

## TABLE OF AUTHORITIES CITED

CASES	PAGE
Aero Mayflower Transit Co. case, 332 U. S. 495, 68 S. Ct. 167, 92 L. Ed. 99.....	35
Ainsworth v. Bryant, 34 Cal. 2d 465.....	35
Banken v. State Board of Equalization, 79 Cal. App. 2d 572.....	32
Bigsby v. Johnson, 18 Cal. 2d 860.....	20, 22
Bird & Jex Co. v. Anderson Motor Co., 92 Utah 493, 69 P. 2d 510 .....	30, 31
Boteler v. Ingels, 308 U. S. 57, 60 S. Ct. 29, 84 L. Ed. 78.....	22
California Pea Products, In re, 37 Fed. Supp. 658.....	22, 45
City of New York v. Jersawit, 85 F. 2d 225.....	30, 31, 37
Coca-Cola v. State Board of Equalization, 25 Cal. 2d 918, 156 P. 2d 1.....	46
Corbett v. Printers & Publishers Corp., Ltd., 127 F. 2d 195.....	14
Davies Warehouse Co. v. Bowles, 321 U. S. 144, 64 S. Ct. 474, 88 L. Ed. 635.....	37, 38
Davis Standard Bread Co., In re, 46 Fed. Supp. 841; aff'd 131 F. 2d 386.....	23, 45
Graves v. People of State of New York, ex rel. O'Keefe, 306 U. S. 466, 59 S. Ct. 595, 83 L. Ed. 927.....	24, 25, 30, 34
International Harvester Co. v. Wisconsin Department of Taxation, 322 U. S. 435, 64 S. Ct. 1060, 88 L. Ed. 1373.....	36
Interstate Oil Pipe Line Co. v. Stone, 337 U. S. 662, 69 S. Ct. 1264, 93 L. Ed. 1613.....	36
Kamp v. Johnson, 15 Cal. 2d 187.....	32, 33
Los Angeles City High School District v. State Board of Equalization, 71 Cal. App. 2d 486.....	16, 29
Maranville v. State Board of Equalization, 99 A. C. A. 1013.....	32
Martin Ship Service Co. v. City of Los Angeles, 34 Cal. 2d 793 .....	35
McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33, 60 S. Ct. 388, 84 L. Ed. 565.....	43

	PAGE
Metcalf & Eddy v. Mitchell, 269 U. S. 514, 46 S. Ct. 172, 70 L. Ed. 384.....	31
Mid American Co., In re, 31 Fed. Supp. 601.....	23, 24, 25, 30, 37
National Ice & Cold Storage Co. of California v. Pacific Fruit Express Co., 11 Cal. 2d 283.....	35
Nevada-California Electric Corp. v. Corbett, 22 Fed. Supp. 951..	14
Northwestern Pacific Railroad Co. v. State Board of Equaliza- tion, 21 Cal. 2d 524.....	20, 22, 26, 28, 29
O'Neil v. United Producers & Consumers Co-op., 57 Ariz. 295, 113 P. 2d 645.....	40
Palmer v. Webster & Atlas Bank, 312 U. S. 156, 61 S. Ct. 542, 85 L. Ed. 642.....	22
People v. County of Imperial, 76 Cal. App. 2d 572.....	16, 29
People v. Herbert's of Los Angeles, 3 Cal. App. 2d 482.....	35
People v. Monterey County Ice, etc., 29 Cal. App. 2d 421.....	35
Richfield Oil Co. v. State Bd. of Equalization, 27 Cal. 2d 150, 163 P. 2d 1, 329 U. S. 69, 67 S. Ct. 156, 91 L. Ed. 80.....	33, 36
Roth Drug, Inc., v. Johnson, 13 Cal. App. 2d 720.....	35
Spector Motor Service case, 323 U. S. 101, 65 S. Ct. 152, 89 L. Ed. 101.....	36
State Board of Equalization v. Boteler, 131 F. 2d 386.....	17, 19, 45
State of Missouri v. Gleick, 135 F. 2d 134.....	23, 24, 25, 30
State of Wisconsin v. J. C. Penney Co., 311 U. S. 435, 61 S. Ct. 246, 85 L. Ed. 267.....	36
Thompson v. State of Louisiana, et al., 98 F. 2d 108.....	22
Union League Club v. Johnson, 18 Cal. 2d 275.....	16, 29
United States v. Pyne, 313 U. S. 127, 61 S. Ct. 893, 85 L. Ed. 1231 .....	44
Western Lithograph Co. v. State Board of Equalization, 11 Cal. 2d 156.....	35
Zimmer v. New York Taxing Commission, 126 F. 2d 604; cert. den. 316 U. S. 701, 62 S. Ct. 1299, 86 L. Ed. 1769.....	22

STATUTES	PAGE
Bankruptcy Act, Chap. XI.....	3
Bankruptcy Act, Sec. 24(a) .....	1
California Constitution, Art. XX, Sec. 6.....	13
California Sales and Use Tax Law, Sec. 6002.....	19
California Sales and Use Tax Law,, Sec. 6005.....	17, 19, 26, 46
California Sales and Use Tax Law, Sec. 6006.5 .....	29
California Sales and Use Tax Law, Sec. 6015.....	15
California Sales and Use Tax Law, Sec. 6018.....	32, 33
California Sales and Use Tax Law, Sec. 6052.....	41
California Sales and Use Tax Law, Sec. 6066.....	40
California Sales and Use Tax Law, Sec. 6711.....	39
California Statutes of 1947, p. 656.....	32
California Statutes of 1947, p. 2030.....	29
Code of Civil Procedure, Sec. 401.....	48
Federal Rules of Civil Procedure, Rule 3.....	14
Federal Rules of Civil Procedure, Rule 4.....	14
Federal Rules of Civil Procedure, Rule 8.....	14
Revenue and Taxation Code, Sec. 5.....	18
Revenue and Taxation Code, Sec. 19 .....	18, 19
Revenue and Taxation Code, Sec. 28.....	18, 19, 26
Revenue and Taxation Code, Sec. 6051.....	15
Revenue and Taxation Code, Div. 2, Part 1, Sec. 6931.....	13
Statutes of 1949, Chap. 728.....	15
United States Code, Title 11, Sec. 47(a).....	1
United States Code, Title 28, Sec. 124a.....	23
United States Code, Title 28, Sec. 959.....	23, 43, 47
United States Code, Title 28, Sec. 959a.....	39



	PAGE
United States Code, Title 28, Sec. 960.....	
.....	11, 21, 23, 25, 28, 40, 43, 45, 47
United States Code, Title 28, Sec. 1341 .....	13, 14
United States Code, Title 28, Sec. 2281.....	14
United States Code, Title 28, Sec. 2284.....	14

#### TEXTBOOKS

49 American Jurisprudence, pp. 301, 304.....	11
1 Remington, Bankruptcy, p. 40.....	12
3 Willoughby, Constitution of the United States (2d Ed., 1929), pp. 1381, 1396.....	11



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of West Coast Cabinet Works, Inc.,

*Appellee.*

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## APPELLANT'S OPENING BRIEF.

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### Preliminary Jurisdictional Statement.

The within appeal is taken pursuant to an Order of this Court filed November 21, 1950 [Tr. 107-108] upon appellant's petition pursuant to Section 24(a) of the Bankruptcy Act, 11 U. S. C., Section 47(a), for the allowance of an appeal from an Order [Tr. 48, 49] of the United States District Court for the Southern District of California, Central Division, entered on October 5, 1950, denying appellant's petition for review of an Order [Tr. 8-11] entered by the Honorable Hugh L. Dickson, Referee in Bankruptcy, enjoining appellant from enforcing provisions of the California Sales and Use Tax Law with reference to sales of five trucks by appellee. The opinion of the District Court was filed August 7, 1950, and is reported in 92 Fed. Supp. 636.

### Statement of the Case.

The presentation of the issues involved in this appeal is complicated by the fact that appellant's view of the facts established by the record differs fundamentally from the factual situation upon which the decision of the District Court was predicated. Furthermore, the Judge below rendered a lengthy written opinion covering 34 pages in 92 Fed. Supp. pages 636-672, inclusive, which is likewise predicated upon a factual situation which appellant submits is not supported by the record, and upon various erroneous conclusions regarding the nature and character of the California Sales and Use Tax Law. It is obvious, therefore, that Appellant's Opening Brief must concern itself not only with the issues related to the factual situation established by the record herein but also with the issues considered by the District Judge under his view of the facts.

To facilitate this Court's consideration of all the issues involved in this appeal, the argument herein will be presented in two parts. The first part of the argument will be predicated upon the record. The second part of the argument will be predicated upon the District Judge's view of the facts. To additionally simplify this presentation, each part of the argument will contain its own preliminary factual statement.

This Court is respectfully requested, considering counsel's burden in this matter and the end sought to be accomplished, viz., as concise and coherent a presentation as possible under the circumstances, to indulge this deviation from the form ordinarily employed by an appellant in his opening brief.

## ARGUMENT.

### PART I: ISSUES RAISED IN LIGHT OF THE FACTS ESTABLISHED BY THE RECORD.

#### A. Pertinent Facts.

Proceedings involving West Coast Cabinet Works, Inc., a corporation, were first commenced in the Bankruptcy Court on February 5, 1946, by the filing of a petition under Chapter XI of the Bankruptcy Act. Prior to that date the corporation had been engaged in the business of selling tangible personal property at retail in the State of California under a seller's permit issued by appellant pursuant to the provisions of the California Sales and Use Tax Law, California Revenue and Taxation Code, Division 2, Part 1. It is not disputed that prior to February 5, 1946 (the commencement of proceedings under Chapter XI) the corporation duly filed with appellant the returns required by the California Sales and Use Tax Law. Nor is it disputed that the tax attributable to the sales reported on said returns was duly paid to appellant as required by said law. [Tr. 86-87.]

Upon the filing of the corporation's petition under Chapter XI of the Bankruptcy Act on February 5, 1946, George T. Goggin was appointed as receiver, and on February 26, 1946, Mr. Goggin was additionally nominated to act as trustee of the corporation's estate in the event adjudication occurred. Mr. Goggin's prospective nomination as trustee was duly approved by the referee having jurisdiction. [Tr. 87.]

Upon his appointment as receiver in the Chapter XI proceedings commenced by West Coast Cabinet Works, Inc. (thereupon the debtor in those proceedings), Mr. Goggin applied for and obtained from appellant a seller's permit to engage in the business of selling tangible per-

sonal property, and it is not disputed that Mr. Goggin, as receiver, engaged in the business of selling tangible personal property at retail in the State of California from February 5, 1946, to and including March 11, 1946. Nor is it disputed that the returns and tax payments required by the California Sales and Use Tax Law for that period were duly filed and paid, respectively, by Mr. Goggin, as receiver. [Tr. 87-88.]

On March 12, 1946, West Coast Cabinet Works, Inc., was adjudicated bankrupt, and pursuant to the aforesaid nomination Mr. Goggin was duly appointed trustee in bankruptcy of said corporation's estate. Again, as was the case when Mr. Goggin was appointed receiver of this corporation under Chapter XI, he applied for and obtained from appellant a permit to engage in the business of selling tangible personal property in the State of California, and appellee stipulated in the course of the hearing before the Referee from which this appeal originates that appellee was engaged in the sale of tangible personal property at retail in the State of California during the period commencing March 12, 1946, *to and including May 1, 1946.* [Tr. 88.] It was further stipulated that not only had appellee engaged in the sale of tangible personal property at retail in this state during the period March 12, 1946, to May 1, 1946, inclusive, but also that appellee had filed with appellant the returns required by the California Sales and Use Tax Law for that period and paid the tax on the taxable sales reported thereon. [Tr. 88.]

The record further discloses [Tr. 63-66] that numerous retail sales and sales for resale were made by Mr. Goggin, first as receiver and then as trustee, during the period commencing March 12, 1946, *to and including May 14, 1946.*

On or about September 13, 1946, upon audit of the returns filed by appellee, as aforesaid, appellant duly determined in the manner provided for by the California Sales and Use Tax Law that appellee was indebted to it under said law for taxes attributable to the sale of five trucks on March 29, 1946, which had not been reported by appellee upon the returns filed by him, as aforesaid. [Tr. 6, 66, 89.] Appellee did not contest appellant's determination of additional taxes due by the filing of the petition for redetermination, as provided for by the California Sales and Use Tax Law, nor did he pay the additional tax and interest determined to be due after the additional determination became final under said law. [Tr. 89.] Upon appellee's failure to pay the additional determination and interest, after the determination became final, appellant thereupon added to the determination of additional tax due the ten per cent penalty imposed by the Sales and Use Tax Law for failure to make timely payment. [Tr. 89.]

On October 3, 1946 [Tr. 4] appellee obtained from the Referee in Bankruptcy an *ex parte* Order directed to appellant Board members requiring them to appear before the Referee and show cause why they should not be permanently enjoined and restrained from enforcing the provisions of the California Sales and Use Tax Law against appellee. The Referee directed service by mail. The petition upon which said Order to Show Cause was issued (amended by stipulation) made it clear that the enforcement sought to be enjoined thereby was collection of the tax, penalty and interest determined to be due appellant from appellee, as aforesaid, with respect to the sale of five trucks by appellee on March 29, 1946. [Tr. 5-7, 66, 89.] *Reference to the entire record herein fails to disclose that appellant took any action of any kind*

*whatsoever to collect the aforesaid additional sales tax determination beyond notifying appellee that said determination had been made. Appellant did not at any time file a claim or proof of claim for the aforesaid tax liability in the Bankruptcy Court.*

Pursuant to the aforesaid Order to Show Cause, hearings were had before the Honorable Hugh L. Dickson, the Referee in Bankruptcy having jurisdiction of the bankrupt estate, and on December 9, 1946, the Referee permanently enjoined appellant from attempting in any manner whatsoever to enforce against appellee or the within bankrupt estate payment of the aforesaid additional determination. Additionally enjoined was any enforcement of or attempt to enforce, against appellee or the within bankrupt estate, any of the provisions of the California Sales and Use Tax Law with reference to the aforesaid sales on March 29, 1946.

On January 7, 1947, appellant duly petitioned [Tr. 11-20] for review of the aforesaid Referee's Order, and on February 19, 1947, the Referee filed his Certificate on Review. On February 14, 1949 [Tr. 24], pursuant to a stipulation of counsel dated February 9, 1949 [Tr. 24-29], the District Judge before whom the aforesaid Petition for Review was pending ordered the Referee's Certificate amended pursuant to said stipulation.

The Court's attention is directed to the fact that the stipulation, pursuant to which the Referee's Certificate was amended, makes part of the record testimony and evidence establishing (1) appellant's administrative practice in applying the California Sales and Use Tax Law in connection with liquidating sales, and (2) that audit of appellee's activities during the period March 12, 1946, to



April 14, 1946, inclusive [see Tr. 64-66], disclosed 44 sales of tangible personal property; that 32 of such sales were retail sales, or, in other words, sales to ultimate consumers or for purposes other than resale; that 12 of such sales were sales for resale; *and that 9 of the aforesaid 44 sales of tangible personal property were sales of cabinets or cupboards which were manufactured in the course of the appellee's operation of the bankrupt's business.* [Tr. 28.]

The Court's attention is additionally directed to the First and Final Report and Account of Receiver, Petition to pay expenses of administration and Petition for discharge, filed by appellee with the Bankruptcy Court on July 17, 1946. [Tr. 52-53.] It is clear from paragraphs II and V thereof that George T. Goggin, as receiver, maintained and operated the business of the bankrupt from February 5, 1946, to March 12, 1946, and that he claimed, and was allowed, compensation therefor. The Order approving appellee's First Report and Account dated August 20, 1946 (after a hearing thereon on August 8, 1946), specifically allowed appellee the sum of \$450.00, apparently as an additional fee for operating the bankrupt's business as receiver, and the further sum of \$500.00 was paid to appellee *for operating the business as trustee* in addition to the trustee's fee.

After amendment of the Referee's Certificate, as set forth above, to add the matters indicated to the record herein, and after appellant's Petition for Review was heard by the Honorable Jacob Weinberger, Judge of the District Court, the Judge filed his Opinion which is reported in 92 Fed. Supp. 636. Counsel for appellee prepared proposed findings and on August 24, 1950, appellant filed its objections thereto. [Tr. 35-38.] There-

after, pursuant to a minute order (Judge Weinberger's calendar August 29, 1950) appellant prepared and filed proposed findings pursuant to the aforesaid objections. [Tr. 38-43.]

On October 2, 1950, Judge Weinberger filed his Findings and Conclusions of Law and formal Order [Tr. 43-49] denying the Board's Petition for Review.

### B. The District Court's Findings Are Not Supported by the Record.

It is to be noted that Judge Weinberger in his findings specifically found that appellee conducted the business of the bankrupt and engaged in the business of selling tangible personal property at retail *only* to and including March 22, 1946 *despite* the fact that the stipulation of facts previously referred to [Tr. 88] entered into by and between counsel for the parties to this appeal, in the course of the hearing before the Referee on the Order to Show Cause involved herein, specifically establishes that during "the period from March 12, 1946, to May 1, 1946, George T. Goggin, as trustee for said bankrupt, was engaged in the sale of tangible personal property at retail in the State of California and filed with the Board sales tax returns and reported and paid sales tax on the taxable sales so reported in said returns. . . ." The foregoing finding was made by the Judge despite the fact that the record herein establishes retail sales made by appellee from March 26 to May 14, 1946, ten of which, at least, were made from the premises at which appellee was operating the bank-

rupt's business. [Tr. 53.] Reference to Board's Exhibit "A" [Tr. 64-66] discloses that appellee's last sale on May 14, 1946, was a sale of cabinets completed after March 29, 1946.

Judge Weinberger's Findings of Fact, paragraph VIII, to the effect that appellant "prior to the issuance by the Referee of the injunction herein, and at the time of the issuance of said injunction was attempting to, and unless restrained will, enforce the provisions of said law against the trustee and the bankrupt estate herein" is entirely unsupported by the record which discloses that the only action taken by appellant consisted of making the additional determination in the manner provided for by the California Sales and Use Tax Law and making a demand for the payment thereof. There is nothing in the record to intimate, even remotely, that any improper action against appellee or the within bankrupt estate was ever contemplated by appellant.

In paragraph IX of his Findings the District Judge again found as a fact, contrary to the record herein as outlined above, that appellee did not conduct any business nor engage in the business of selling tangible personal property subsequent to March 22, 1946.

It will serve no purpose to repeat here the full extent of the District Judge's deviation from the record in his Findings of Fact, inasmuch as the extent of that deviation is fully outlined in appellant's objections to appellee's proposed Findings and in the proposed Findings prepared by appellant. [Tr. 35-43.]

Briefly summarized, however, appellant submits that the record herein establishes clearly that the five trucks sold on March 29, 1946, were sold by appellee during a period in which he was operating the business of the bankrupt. It is not disputed that the five sales of trucks were liquidating sales.

**C. Issues Raised in Light of the Facts Established by the Record.**

1. May a Referee in Bankruptcy, *ex parte*, solely upon petition of a trustee in bankruptcy in a proceeding to which neither the State of California nor the agency here involved is a party obtain jurisdiction of the State of California and/or said agency by the issuance of an order to show cause peremptorily directing the agency to appear and show cause why it should not be enjoined from enforcing a valid state taxing statute with respect to activities of a trustee in bankruptcy during a period in which he was operating the business of a bankrupt?

2. Assuming, *arguendo*, that a bankruptcy referee has jurisdiction to issue an order to show cause as outlined in the preceding paragraph, are the gross receipts from liquidating sales made by a trustee in bankruptcy, during a period in which he is operating a bankrupt's business, includible in the measure of the tax imposed upon said trustee by the California Sales and Use Tax Law for the privilege of engaging in the business of making sales of tangible personal property at retail?

#### D. Specification of Errors.

1. The District Judge failed to recognize that the proceedings before the Referee amounted to a suit against the State of California without its consent.

2. The District Judge failed to give effect to the provisions of Section 960, 28 U. S. C., which provides that any officer or agent conducting any business under authority of the United States Court shall be subject to all State taxes applicable to such business to the same extent as if it were conducted by an individual or corporation.

3. Assuming the District Judge had jurisdiction to determine the tax question involved, he erroneously concluded that the gross receipts derived by a trustee in bankruptcy from liquidation sales made during a period within which the trustee was operating a bankrupt's business, and engaging in the business of making sales of tangible personal property at retail, are not includible in the measure of the tax imposed by the California Sales and Use Tax Law upon retailers for the privilege of engaging in that activity.

#### E. It Is Elementary That a State Cannot Be Sued Without Its Consent.

A state's immunity from suit without its consent, either directly or through one of its duly constituted agencies, is too well established to warrant discussion.

Willoughby on the Constitution of the United States, Vol. 3, 2d Ed. (1929), commencing at page 1381, and at page 1396;

49 Am. Jur., at pages 301, 304.

**F. Neither the State of California Nor Its Duly Authorized Taxing Agency, the California State Board of Equalization (Appellant Herein) Was a Party to the Bankruptcy Proceeding Involving the West Coast Cabinet Works, Inc.**

Bankruptcy proceedings are proceedings *in rem*.

1 Remington on Bankruptcy, 40 *et seq.*

Upon the commencement of a bankruptcy proceeding by the filing of an appropriate petition, the bankruptcy court obtains jurisdiction only of the bankrupt, the bankrupt's estate and creditors of the bankrupt.

It is apparent from the record herein that the bankruptcy referee did not attempt to obtain jurisdiction of appellant as a creditor of the bankrupt, for, obviously, the Referee's Order to Show Cause related to a tax liability attributable to the activities of appellee, the trustee in bankruptcy.

**G. The Proceedings Below in Effect Amounted to a Suit Against Appellant, a Duly Constituted Agency of the State of California.**

Inasmuch as appellant was not asserting a claim in the bankruptcy proceedings involving West Coast Cabinet Works and, accordingly, was not a party to that proceeding, it is apparent that for there to be a valid injunction against appellant this Court must conclude that appellee commenced some independent proceeding to which appellant was properly made a party in a court of competent jurisdiction.

We are not aware of any proceeding or any suit properly commenced by appellee against appellant in con-

formity with the provisions of the Judicial Code. For this Court to uphold the Order below, accordingly, it must necessarily conclude that appellee somehow properly commenced a suit against appellant in an authorized manner. We are unable to perceive how such a conclusion can be reached.

**H. The State of California Has Specifically Denied Its Consent to Procedure by Way of Injunction, Mandamus, or Other Legal or Equitable Process to Prevent or Enjoin the Collection of Any Tax Under the California Sales and Use Tax Law.**

Even if it be assumed, *arguendo*, that appellee did appropriately attempt to commence an action against appellant for an injunction, that action will nevertheless not lie since the State of California has specifically denied its consent to a suit against it to enjoin the collection of any tax liability arising under the California Sales and Use Tax Law.

California Constitution, Article XX, Section 6;

California Sales and Use Tax Law, California Revenue and Taxation Code, Div. 2, Part 1, Sec. 6931.

**I. Federal District Courts Do Not Have Jurisdiction to Enjoin the Collection of State Taxes Under a Valid Taxing Statute Where an Adequate Remedy Exists Under State Law.**

Apart from considerations of immunity and consent to a suit, it is to be noted that Federal District Courts are courts of limited jurisdiction having only such jurisdiction as Congress has specifically conferred upon them. It is clear from the provisions of Section 1341, 28 U. S. C., that

the power conferred upon Federal District Courts does *not* include the power to enjoin the collection of state taxes under a valid taxing statute where an adequate remedy exists under state law. It has been established in Federal District and Appellate Courts that an adequate remedy does exist under the California Sales and Use Tax Law.

*Nevada-California Electric Corp. v. Corbett*, 22 Fed. Supp. 951;

*Corbett v. Printers & Publishers Corp., Ltd.*, 127 F. 2d 195.

(We note at this point that the District Judge did not agree with appellant's contention that a speedy and adequate remedy was available to appellee. However, the District Judge's conclusion was predicated upon the numerous erroneous premises discussed below in our analysis of his Opinion.)

The Court's attention is additionally directed, insofar as jurisdiction of the Federal District Court is concerned, to the fact that, if it holds Section 1341 inapplicable here, appellee did not comply with Rules 3, 4 and 8 of the Federal Rules of Civil Procedure in attempting to bring a suit for injunction against appellant.

Additionally noted should be the provisions of Sections 2281 and 2284, 28 U. S. C., which provide that even in instances where a State board such as appellant seeks to enforce an unconstitutional state statute an injunction may be issued only by a three judge court.



## J. In Any Event the Taxes in Question Were Properly Imposed Upon Appellee.

This point will be discussed here on the assumption that the tax question involved is properly before this Court, and without regard to the District Judge's Opinion, which will be analyzed below.

### 1. Nature of the Tax.

The California sales tax is imposed upon "all retailers" at the rate of three per cent (for a time two and one-half per cent) of the gross receipts derived by them from the sale of "all tangible personal property sold at retail in this state." (California Sales and Use Tax Law, Revenue and Taxation Code, Section 6051.)

"Retailers" are defined in Section 6015 of the Sales and Use Tax Law. Prior to July 1, 1949, and during the period involved herein, the definition of "retailer" included "Every person engaged in the business of making sales at retail or in the business of making retail sales at auction of tangible personal property owned by the person or others." In 1949 (California Statutes 1949, Chapter 728—operative July 1, 1949) the foregoing quoted language was amended to read "Every seller who makes any retail sale or sales of tangible personal property and every person engaged in the business of making retail sales at auction of tangible personal property owned by the person or others."

The term "business" is defined by the California Sales and Use Tax Law as including "any activity engaged in by any person or caused to be engaged in by him with the object of gain, benefit, or advantage, either direct or indirect."

As construed by the California Supreme Court, the term “business”, as employed in the California Sales and Use Tax Law, does not necessarily involve the making of a profit, nor does it necessarily involve the operation of a business enterprise in the general sense. In *Union League Club v. Johnson*, 18 Cal. 2d 275, the California Supreme Court held that gross receipts from the operation of a dining room and bar of a non-profit corporation organized for social and political purposes were nevertheless subject to the sales tax because some gain, benefit or advantage was derived therefrom by the Club. In *Los Angeles City High School District v. State Board of Equalization*, 71 Cal. App. 2d 486, the California District Court of Appeal held that a school district was engaged in “business” within the purview of the California Sales and Use Tax Law by virtue of retail sales, averaging two or three per quarter over a period of several years, of tangible personal property no longer needed for school purposes. Obviously, a school district is not a business enterprise in the ordinary, general sense nor would the liquidation of equipment no longer needed for school purposes be generally characterized as a business enterprise in the general sense. Similarly, in *People v. County of Imperial*, 76 Cal. App. 2d 572, a county was held to be engaged in “business” within the purview of the California Sales and Use Tax Law by virtue of sales made, over a period of years, of materials and equipment originally acquired but no longer needed for use in constructing and maintaining roads and highways.

2. Appellee Was Within the Purview of the Taxing Statute.

It is clear from the foregoing provisions and cited cases that the California sales tax is imposed upon those making sales of tangible personal property at retail for gain, benefit, or advantage, either direct or indirect, and it would appear not to require further argument to support the contention that appellee, by virtue of the numerous sales made in the relatively short period commencing March 12, 1946 and ending May 14, 1946, was subject to the California sales tax.

The learned Judge below, however, predicated his opinion in part upon the premise that a trustee in bankruptcy is not a "person" within the definition of Section 6005, and, accordingly not subject to the California sales tax. The decision of this Court in *State Board of Equalization v. Boteler*, 131 F. 2d 386, is also cited. The fact that the definition of "person" as it read when it was considered by this Court in *State Board of Equalization v. Boteler, supra*, was thereafter changed to include therein "trustees" and "the United States" was recognized by the District Judge but he concluded that if the Legislature had intended to overrule this Court's views in *State Board of Equalization v. Boteler, supra*, it would have specifically said so by adding to the definition of "person" "trustee in bankruptcy" rather than merely "trustee." Ignored entirely by the District Judge is the inclusion of "the United States" in the definition of the word "person" concurrently with the inclusion of "trustees." If we understand appellee's

contentions correctly and the views of the District Judge, it was held below that trustees in bankruptcy are not included in the definition of "persons" because they are in effect officers of the United States and not to be blithely characterized as "trustees." If this contention be valid, however, it must necessarily follow from the inclusion of "the United States" in the definition of "person" that trustees in bankruptcy, as officers of the judicial arm of the United States, *are* clearly included within the definition of "person."

As additional support for the proposition that the Legislature intended the California Sales and Use Tax Law to apply to trustees in bankruptcy, this Court's attention is directed to Section 28 of the California Revenue and Taxation Code, which provides that as used in Division 2 of that Code (the California Sales and Use Tax Law being Part 1 of said Division 2) the term "person" shall include, in addition to the items of definition contained in Section 19, "trustee, trustee in bankruptcy, receiver, executor, administrator or assignee." Section 19 includes within the definition of "person" any person, firm, partnership, association, corporation, company, syndicate, estate, business, trust, or organization of any kind." Sections 19 and 28 are found in the preliminary portion of the Revenue and Taxation Code entitled "General Provisions" and Section 5 thereof specifically provides that "Unless the context otherwise requires, the general provisions hereinafter set forth govern the construction of this code."

The opinion below concludes that the definition of “person” in Sections 19 and 28 is not pertinent to a consideration of the definition of that term in the California Sales and Use Tax Law; firstly, on the ground that Section 6002 of the law specifically excludes definitions other than contained in that law, and secondly, since Section 28 was added by an enactment primarily concerned with the administration and collection of the Motor Vehicle Fuel License Tax and so entitled. It is submitted that the addition of Section 28 in 1943 and the amendment of Section 6005 in 1945 to specifically include “trustees” and “the United States” in the definition of “person” as used in the California Sales and Use Tax Law, coupled with the decision of this Court in November of 1942 (*State Board of Equalization v. Boteler, supra*), constitute a clear refutation of the contention that the California Legislature did not intend to affirm the inclusion of “trustees in bankruptcy” within the definition of those subject to the provisions of the California Sales and Use Tax Law.

We are unable to perceive a logical basis for concluding that although the California Legislature added Section 28 to clearly place trustees in bankruptcy within the scope of the Motor Vehicle Fuel License Tax Law it did not intend to make such trustees subject to the Sales and Use Tax Law, even though the broadened definition of “persons” to include trustees in bankruptcy for purposes of the Motor Vehicle Fuel License Tax Law was placed in the “General Provisions” portion of the Revenue and

Taxation Code, and despite the fact that the definition of “person” in the Sales and Use Tax Law itself was broadened to even a greater extent by the use of the words “the United States” rather than by reference to merely a specific federal officer or agent.

**3. The Gross Receipts Derived by Appellee From the Sales Involved Were Properly Included in the Measure of His Sales Tax Liability.**

The only question remaining for consideration, therefore, is whether gross receipts derived by appellee from the sale of capital assets, namely, five trucks held by him in the course of his retail sales activity, are includible in the measure of the tax imposed upon appellee as a retailer under the California Sales and Use Tax Law.

The California Supreme Court in *Bigsby v. Johnson*, 18 Cal. 2d 860, and *Northwestern Pacific Railroad Co. v. State Board of Equalization*, 21 Cal. 2d 524, has held that a retailer is required to pay sales tax measured by his receipts from the sale of equipment during his operation of a retail business enterprise, and it is submitted that those cases are decisive of the point at issue here.

Appellee should have included in the returns filed with appellant under the California Sales and Use Tax Law, for the period March 12, 1946 to May 1, 1946, the gross receipts received by him from the sale of five trucks at retail on March 29, 1946, and paid the tax attributable thereto.

## PART II: ANALYSIS OF THE OPINION BELOW.

### A. Preliminary Statement.

As we indicated in the preliminary paragraphs of this brief, appellant desires to present to this Court, for its consideration, all the issues considered and raised by the learned District Judge in his lengthy Opinion. The imposition of the California sales tax upon liquidation sales made by trustees in bankruptcy is a question of great importance which has occurred with vexatious frequency in most bankruptcy proceedings, and inasmuch as the District Judge recognized the importance of the problem and devoted an exceptional amount of time and energy to its consideration, it is appellant's thought that a consideration of the points discussed by the Judge in his Opinion below in the sequence employed by him would serve best to delineate the numerous facets of the problem presented.

In the following portion of this brief, accordingly, the matters discussed in the Opinion below will be discussed *seriatim*, with appropriate headings and references to the pagination of the printed report, 92 Fed. Supp. 636.

### B. The Facts Upon Which the Opinion Below Was Predicated.

The learned Judge below predicated his entire Opinion upon the assumption that appellee did not operate the business of the bankrupt subsequent to March 22, 1946 (the record to the contrary, as we have attempted to point out above) and that the Court was concerned solely with liquidation sales made on March 29th by a trustee in bankruptcy who was *not* operating a business and accordingly not within the purview of Section 960, 28 U. S. C.

This assumption was made by the Judge below despite his awareness of the fact that at least ten retail sales were made by appellee prior and subsequent to March 29, 1946 and reported to appellant as taxable sales pursuant to the provisions of the California Sales and Use Tax Law.

**C. Applicability of Section 960, 28 U. S. C.,  
Formerly Section 124a of That Title.**

Despite his assumption in the preliminary portion of his opinion that appellee did not operate the business of the bankrupt subsequent to March 22, 1946 and that the sale of five trucks on March 29, 1946 was part of a purely liquidating activity, the Judge below nevertheless purported to consider appellant's contention that gross receipts from the sale of capital equipment by a retailer are includible in the measure of the tax imposed upon the retailer by the California Sales and Use Tax Law. The Judge noted the decisions of the California Supreme Court in *Bigsby v. Johnson*, *supra* (18 Cal. 2d 860), and *Northwestern Pacific Railroad Co. v. State Board of Equalization*, *supra* (21 Cal. 2d 524), but instead of applying those cases to the facts established by the record, relying rather on his assumption that appellee was not conducting any business after March 22, 1946, the District Judge cites the decisions in *Boteler v. Ingels*, 308 U. S. 57, 521, 60 S. Ct. 29, 84 L. Ed. 78, 442; *Palmer v. Webster & Atlas Bank*, 312 U. S. 156, 163, 61 S. Ct. 542, 85 L. Ed. 642; *Zimmer v. New York Taxing Commission*, 2 Cir., 126 F. 2d 604 (certiorari denied 316 U. S. 701, 62 S. Ct. 1299, 86 L. Ed. 1769); *Thompson v. State of Louisiana, et al.*, 8 Cir., 98 F. 2d 108, 111 (and cases cited therein); *In re California Pea Products*, D. C., 37 Fed. Supp. 658, and *In re Davis Standard Bread Co.*, D. C., 46 Fed. Supp. 841



(affirmed 131 F. 2d 386), all to the effect that former Section 124a, 28 U. S. C. (now Section 960 of that title), does not apply to a trustee who does not conduct any business. Obviously, a trustee in bankruptcy engaged in activities not falling within the purview of Section 960, 28 U. S. C., is not subjected to all state taxes in the manner provided for by that section. (Op. 640-642.)

Also discussed by the Judge below in connection with this point (Op. 642) are the decisions in *In re Mid America Co.*, 31 Fed. Supp. 601, a decision of an Illinois district court, and *State of Missouri v. Gleick*, 8 Cir., 135 F. 2d 134, which held that liquidating trustees are conducting business within the purview of former Section 124a (now Section 960, 28 U. S. C.) and that they are, accordingly, subject to all state taxes, as would be private individuals. Although the court in the *Mid America* case specifically concluded that the phrase "conduct any business" should not receive a narrow and restricted interpretation but should be construed to include any activity or operation in connection with the handling and management of the bankrupt estate and despite the fact that Section 959, 28 U. S. C., specifically provides that a trustee appointed in any cause pending in any court of the United States (including a debtor in possession) shall manage and operate property in his possession as such trustee or manager in accordance with the requirements of valid state laws as if the owner were in possession thereof, the Judge below did not follow the *Mid America* decision. Although the United States Court of Appeals for the Eighth Circuit followed the reasoning of the United States Supreme Court in *Graves v. People of State of New York, ex rel. O'Keefe*,

306 U. S. 466, 59 S. Ct. 595, 83 L. Ed. 927, concluding that application of the therein contested state taxing statute to a trustee in bankruptcy does by “no stretch of the imagination . . . impose any burden whatsoever upon the United States or . . . limit or restrict the bankruptcy court as a department of the federal government or the trustee in bankruptcy as an agent and officer of the court, in the discharge of the duties imposed by the bankruptcy act”, and although the Judge below considered this decision (Op. 642), he distinguishes the case presently pending before this Court on the ground that the *Gleick* case involved an unemployment compensation law, which was adopted at the invitation of the national government, and not, as here, a taxing statute imposed by a state for revenue purposes only. In any event, the Judge below (Op. 643) stated he was unable to agree with the decisions in the *Mid America* and *Gleick* cases, although he failed to take into account that the California Sales and Use Tax Law places less of a burden upon a trustee in bankruptcy than did the statutes involved in those cases because under the California statute the trustee is authorized to collect from his vendees the full amount of the tax payable by him under the Sales and Use Tax Law. In other words, whereas the amounts held properly payable by trustees in bankruptcy in the *Mid America* and *Gleick* cases, and by the HOLC employee in the *Graves* case, would, upon their payment, have depleted the estates of the bankrupts involved and the HOLC employee, respectively, compliance with the provisions of the California Sales and Use Tax Law by appellee, insofar as the sale of five trucks on March 29, 1946, is concerned, would not have depleted the instant estate even to the extent of one cent.

It is submitted that the reasoning of the Illinois district court in the *Mid America* case and the United States Supreme Court in the *Graves* case, as followed by the Eighth Circuit in the *Gleick* case, should be adopted by this Court not only for legal and equitable reasons but to preserve to the State of California the revenues normally accruing in connection with the sale of tangible personal property at retail in this State. It is submitted that these considerations should prevail over the sole consideration apparently moving the Judge below, namely, that the phrase "conducting any business", as used in Section 960, 28 U. S. C., should receive a narrow and restricted construction.

(The Court's attention is directed in passing to a wholly irrelevant statement in the Opinion below, at page 643, to the effect that appellee could not at any time "acting under the orders of the court . . . have acquired any personal status as a retailer by virtue of the acts performed under such orders." Inasmuch as this statement may possibly add to the confusion which has existed in connection with liquidation sales by trustees in bankruptcy, this Court is respectfully requested to note the irrelevancy of this statement in its Opinion.)

It should also be noted at this point that the court below failed entirely to consider the applicability of Section 960, 28 U. S. C., and the California Sales and Use Tax Law to liquidating sales made by a trustee who *was* conducting a business as is the case here. See Part I, *supra*.

**D. Trustees in Bankruptcy Are Subject to the California Sales and Use Tax Law Even Though They Engage Solely in Liquidation Activities if They Make a Sufficient Number of Retail Sales.**

Discussed as the "Second Theory" of appellant, commencing at page 643 of the reported Opinion below, is the contention that liquidating sales, if sufficient in number and scope, in and of themselves constitute the trustee making such sales a retailer within the purview of the California Sales and Use Tax Law. After a recital of various sections of the California Sales and Use Tax Law, including the 1945 amendment of Section 6005 including "trustee" and "the United States" in the definition of "person", and reference to the addition of Section 28 to the general provisions of the California Revenue and Taxation Code specifically including "trustees in bankruptcy" within the definition of "person" as used in the portion of the Revenue Code in which the California Sales and Use Tax Law is found, the District Judge concluded at the close of page 646 of the reported Opinion below, despite the most pertinent decision of the California Supreme Court in *Northwestern Pacific Railroad Co. v. State Board of Equalization*, 21 Cal. 2d 524, that liquidating trustees in bankruptcy are not "persons" within the purview of the California Sales and Use Tax Law.

The Judge below failed to reach any conclusion as to whether a trustee in bankruptcy solely making numerous liquidation sales at retail would be subject to the provisions of the California Sales and Use Tax Law if that Law clearly purported to apply to such trustees. To the

contrary, it is apparently concluded that trustees in bankruptcy are not subject to that Law regardless of the nature of their activities, and apparently even though they be clearly conducting the business of a bankrupt. This, of course, is *contra* not only to the administrative interpretation of the California Sales and Use Tax Law by the State agency charged with its enforcement, namely, the appellant, but also contrary to the interpretation of that Law acknowledged by the appellee herein who paid sales tax upon some of the sales made by him after he was appointed trustee and by the referees and judges in this jurisdiction who for many years since the adoption of the sales tax in California have approved the payment of sales taxes by trustees in bankruptcy conducting a business. It is a matter of common knowledge that all those engaged in acting as trustees in numerous estates have for many years applied for sales tax permits, filed sales tax returns, and paid the California sales tax attributable to retail sales made by them in the course of conducting a bankrupt's business.

It is submitted that the Court below failed to recognize the specific issues in question and, in the portion of its Opinion discussed to this point, to distinguish between (1) the question as to whether trustees in bankruptcy are "persons" within the meaning of the California Sales and Use Tax Law, and, accordingly, subject to the imposition of the California sales tax without regard to any possible immunity arising from their status as officers of the Bankruptcy Court, and (2) the question as to whether there is any constitutional or statutory reason why the California Sales and Use Tax Law should not apply to trustees in bankruptcy if the first question be answered in the affirmative.

As we have attempted to point out above (and in this connection see the portion of the decision in the *Northwestern Pacific Railroad Co.* case, *supra*, 21 Cal. 2d 524, relating to the number of sales sufficient in and of themselves to constitute an individual a retailer although he is not normally engaged in the business of selling tangible personal property at retail), it is appellant's position that trustees in bankruptcy are "persons" within the purview of the California Sales and Use Tax Law and that that law is applicable to them as it is to any private person or business corporation. Secondly, if this contention is correct, it is obvious, pursuant to Section 960, 28 U. S. C., that the California Sales and Use Tax Law applies to trustees in bankruptcy "conducting any business." We are not aware of any holding since the adoption of the California sales tax in 1933 to the effect that a trustee in bankruptcy operating the business of a bankrupt is not subject to the California Sales and Use Tax Law. To the contrary, we believe this Court may take judicial notice that the files of the bankruptcy courts in this state are replete with reports and orders disclosing that the district courts have unanimously agreed with appellant's view that trustees in bankruptcy are subject to the California Sales and Use Tax Law. In view of this long-continued administrative interpretation, both by the state agency charged with the law's enforcement and the Bankruptcy Court charged with the administration of bankrupt estates, that the California Sales and Use Tax Law provisions apply to trustees in bankruptcy who operate a bankrupt's business, we are unable to comprehend how it may logically be concluded that the definition of "person" in the California Sales and Use Tax Law does not also include trustees in bankruptcy who do not operate businesses of bankrupts.

It must necessarily follow, accordingly, that trustees in bankruptcy are "persons" within the purview of the California sales tax even though they make only liquidation sales.

**E. Trustees in Bankruptcy Making Liquidation Sales Only Are Retailers Within the Purview of the California Sales and Use Tax Law If the Sales Are Sufficient in Scope and Number.**

The next question presented is whether liquidation sales by themselves are sufficient to constitute trustees in bankruptcy "retailers" if sufficient in scope and number. As we have pointed out above (citing decisions in *Northwestern Pacific*, 21 Cal. 2d 524, the *Los Angeles City High School*, 71 Cal. App. 2d 486; *People v. County of Imperial*, 76 Cal. App. 2d 572, and *Union League Club v. Johnson*, 18 Cal. 2d 275, cases) sales sufficient in scope and number are in and of themselves sufficient to constitute a person a retailer. See, also, Section 6006.5 of the California Sales and Use Tax Law added in 1947 by Cal. Stats. 1947, page 2030.

Once we recognize that a trustee in bankruptcy is subject to the provisions of the California Sales and Use Tax Law and that even though he engages in liquidation sales only, he is nevertheless a retailer if the sales are sufficient in scope, number and character, the question in reality presented becomes apparent, namely, whether there is any federal statutory or constitutional prohibition against the application of the tax.

**F. There Is No Federal Constitutional or Statutory Prohibition Against the Imposition of a Non-Discriminatory State Tax Upon Trustees in Bankruptcy.**

Once the real issue involved herein is recognized, the *Mid America* case, *supra* (31 Fed. Supp. 601), the *Missouri v. Gleick* case, *supra* (135 Fed. 2d 134), and the United States Supreme Court decision in the *Graves* case, *supra* (306 U. S. 466, 59 S. Ct. 595, 83 L. Ed. 927), are brought into focus, insofar as their relevancy to the instant appeal is concerned. Additionally, the Court's attention is directed to the decision of the Court of Appeals for the Second Circuit, in *City of New York v. Jersawit*, 85 F. 2d 225, and to the decision of the Supreme Court of Utah in *Bird & Jex Co. v. Anderson Motor Co.*, 92 Utah 493, 69 P. 2d 510.

In the *Jersawit* case, the Court was concerned with the application of the New York City sales tax which is a consumer type sales tax, rather than a tax on the seller as is the case in California, although the seller is required to collect and report and pay over to the City the tax imposed upon the consumer. Obviously, collection and payment of the New York City sales tax by a trustee in bankruptcy in that jurisdiction does not deplete the bankrupt estate (as is true with respect to the California tax, inasmuch as a trustee in bankruptcy in this jurisdiction, like the New York trustee, can collect the full amount payable to the taxing authority from his vendees). As the Court pointed out in the *Jersawit* case, noting that compliance with the taxing statute would not



deplete the bankrupt estate, compliance with the taxing statute does not impose any burden on a governmental instrumentality, and is, accordingly, not objectionable as an interference with the exercise of a supreme federal function. In the *Bird & Jex Co.* case, the Utah Supreme Court followed similar reasoning, pointing out that there is no reason for immunity inasmuch as compliance with the taxing statute does not diminish the assets of the estate being liquidated.

It is apparent from a consideration of the reported Opinion below, commencing at page 650, that the District Judge concluded he could not follow the *Jersawit* and *Bird & Jex Co.* cases because the California tax is concededly what is popularly known as a “sellers” sales tax, as distinguished from a “consumer’s” sales tax. Ignored by the District Judge, however, is the language in numerous United States Supreme Court cases, some of them cited in the Opinion below, to the effect that the practical operation and effect of the state taxing statute must be considered if interference with a concededly supreme federal power is alleged. As the United States Supreme Court pointed out in *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 523, 46 S. Ct. 172, 70 L. Ed. 384, in discussing state and federal immunity from taxation by each other:

“. . . neither government may destroy the other nor curtail in any substantial manner the exercise of its powers. Hence the limitation upon the taxing power of each, so far as it affects the other, must receive a *practical construction* which permits both to function

with the minimum of interference each with the other; and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax . . . or the appropriate exercise of the functions of the government affected by it." (Emphasis added.)

That is precisely appellant's position.

Commencing at page 651 of the reported Opinion below, the District Judge cites *Kamp v. Johnson*, 15 Cal. 2d 187, and notes that the California Supreme Court in that decision recognized the intention of the California Legislature in adopting the California sales tax to tax every sale of tangible personal property unless specifically exempted. (Cf. *Banken v. State Board of Equalization*, 79 Cal. App. 2d 572, 577, and *Maranville v. State Board of Equalization*, 99 A. C. A. 1013, 1015.) However, instead of concluding from this decision, together with the California decisions previously cited, that all sellers, including trustees in bankruptcy, are clearly within the purview of the California Sales and Use Tax Law, the District Judge erroneously concludes that Section 6018 of the California Sales and Use Tax Law purports to bring within the scope of the California Sales and Use Tax Law not only the optometrists already held so included by the decision in *Kamp v. Johnson, supra*, but physicians and surgeons as well. In all fairness to the District Judge, we respectfully direct this Court's attention to the fact that there are unfortunately in circulation copies of the California Sales and Use Tax Law which contain an inaccurate version of the provisions of Section 6018. That section as added by California Statutes 1947, page 656, in effect September 19, 1947, in fact provides that licensed physicians and surgeons as well as optometrists,

are *consumers* and shall *not* be considered retailers for sales tax purposes with respect to ophthalmic materials used or furnished by them in the performance of their professional services in the diagnosis, treatment or correction of conditions of the human eye including the adaption of lenses or frames for the aid thereof.

In other words, the California Legislature specifically bestowed an exemption upon physicians, surgeons and optometrists who would otherwise be subject to tax pursuant to the views expressed by the California Supreme Court in *Kamp v. Johnson, supra*. The Judge below was undoubtedly misled by copies of the law which omit the word "not" and convey the impression that Section 6018 provides that licensed optometrists or physicians and surgeons *shall be* considered retailers.

Commencing with the fourth paragraph on page 651 of the reported Opinion below, the District Judge discusses the decisions rendered by the California and United States Supreme Courts in the *Richfield Oil* case, 27 Cal. 2d 150, 163 P. 2d 1, 329 U. S. 69, 67 S. Ct. 156, 91 L. Ed. 80. As the District Judge noted, the *Richfield Oil* case was concerned with the prohibition contained in the Federal Constitution against the imposition of a state tax on exports and not with the impact of the imposition of a state tax in a field in which the supreme power of Congress to regulate is well recognized, such as interstate commerce and bankruptcy. The Supreme Court itself in the *Richfield Oil* case recognized the now well established rule which governs cases involving the power of a state to impose a tax in a field where the federal power to regulate is supreme. As the United States Supreme Court noted in its decision, "accommodation has been made by *upholding* taxes designed to make interstate

commerce bear a fair share of the cost of local government from which it receives benefits . . . and by invalidating those which *discriminate against* interstate commerce, which *impose a levy for the privilege of doing it*, which *place an undue burden* on it. . . ." (Emphasis added.)

That is precisely appellant's position.

To our knowledge, there is no absolute prohibition, such as is contained in the import-export clause of the Federal Constitution, nor any other prohibition against the imposition of a non-discriminatory tax upon trustees in bankruptcy if the taxing statute realistically imposes no levy upon the trustee for the privilege of performing his duties (a bankrupt estate would not be depleted even one cent's worth if the trustee complied with the California Sales and Use Tax Law, as we have pointed out above), and places no undue burden on the trustee in bankruptcy (as the United States Supreme Court well recognized in *Graves v. People of the State of New York, supra*, 306 U. S. 466, 59 S. Ct. 593, 83 L. Ed. 927, when it upheld a state's right to tax the salary of a federal employee).

The Court's attention is additionally directed to the fact that the burden imposed on a trustee in bankruptcy by the California Sales and Use Tax Law is certainly less than the burden imposed on the HOLC employee in the *Graves* case, *supra*, inasmuch as the HOLC employee was required to pay the state tax from his own funds in addition to filing a state tax return, whereas trustees in bankruptcy would pay nothing from the bankrupt estate but merely, in effect, collect the amount of tax and report and pay it to the State of California.

**G. Although It Is Not Disputed That the California Sales Tax Is a Tax Imposed on the Seller, the Practical Operation of the State Taxing Statute Must Be Considered.**

The Judge below felt it necessary to cite numerous cases, *People v. Herbert's of Los Angeles*, 3 Cal. App. 2d 482; *Roth Drug, Inc., v. Johnson*, 13 Cal. App. 2d 720; *Western Lithograph Co. v. State Board of Equalization*, 11 Cal. 2d 156; *National Ice & Cold Storage Co. of California v. Pacific Fruit Express Co.*, 11 Cal. 2d 283; *People v. Monterey County Ice, etc.*, 29 Cal. App. 2d 421, and *Ainsworth v. Bryant*, 34 Cal. 2d 465, to support his conclusion that the California sales tax is a tax legalistically imposed on the seller and not the consumer, even though this point has at all times been conceded by appellant. Similarly, the Judge below felt it necessary to cite the *Aero Mayflower Transit Co.* case, 332 U. S. 495, 68 S. Ct. 167, 92 L. Ed. 99, and cases cited therein, to support the proposition (again at all times conceded by appellant) that federal courts are bound by the construction placed upon a state statute by the highest court of the state.

We are unable to comprehend, however, how the technical, legalistic character of the California sales tax, as a tax upon the seller, can be determinative of the conclusion to be reached as to whether the imposition of the California sales tax upon trustees in bankruptcy amounts to an unconstitutional interference with the exercise by Congress of its recognized supreme power in the field of bankruptcy. The very cases cited by the Judge below on this point, namely, *Martin Ship Service Co. v. City of Los Angeles*, 34 Cal. 2d 793, quoting from the de-

cision of the United States Supreme Court in *Interstate Oil Pipe Line Co. v. Stone*, 337 U. S. 662, 69 S. Ct. 1264, 93 L. Ed. 1613; *State of Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 61 S. Ct. 246, 85 L. Ed. 267; *International Harvester Co. v. Wisconsin Department of Taxation*, 322 U. S. 435, 64 S. Ct. 1060, 88 L. Ed. 1373, and *Richfield Oil Co. v. State Board of Equalization*, *supra* (329 U. S. 69, 67 S. Ct. 156, 91 L. Ed. 80), all stand for the proposition that the practical operation of challenged state statutes must be looked to and not their descriptive labels. As the Judge below recognized (Op. 653), the United States Supreme Court has stated again and again, in considering the question here involved, that it will look to the actual incidence of the tax and its practical operation in determining whether the taxpayer is deprived of a federal right or whether the state is within its constitutional power, not to the characterization of the state taxing statutes by state courts.

It necessarily follows, accordingly, that there is no constitutional objection to the imposition of the California sales tax upon trustees in bankruptcy inasmuch as in the practical operation of that taxing statute no burden is placed upon the trustees in bankruptcy, as we have pointed out above, by virtue of the provision in the California Sales and Use Tax Law authorizing sellers to collect the full amount of tax payable by them from their vendees. We, accordingly, see no reason why this Court cannot express itself regarding the constitutionality of the California Sales and Use Tax Law, as applied to appellee herein, even in the light of the decision of the United States Supreme Court in the *Spector Motor Service* case cited by the Judge below. (323 U. S. 101, 65 S. Ct. 152, 89 L. Ed. 101.)

## H. Principles of Statutory Construction Should Not Be Loosely Applied to Support a Predetermined Conclusion.

Commencing at page 654 of the reported Opinion below, the learned District Judge cited various cases bearing upon the application of well recognized principles of statutory construction to support his conclusion, which was quite apparent at this point in his Opinion, that the California sales tax cannot constitutionally be imposed upon trustees in bankruptcy in connection with liquidation sales made by them. It is submitted, however, that the Judge below applied these principles of statutory construction with a complete disregard for the practical operation of the California Sales and Use Tax Law insofar as trustees in bankruptcy are concerned.

For example, at page 655 of the reported Opinion, the District Judge quotes from the decision of the United States Supreme Court in *Davies Warehouse Co. v. Bowles*, 321 U. S. 144, 64 S. Ct. 474, 88 L. Ed. 635, wherein that Court considered a contention that an exemption provision in a federal statute must receive an interpretation "as a matter of principle which will give the exemption a general and uniform operation in all states irrespective of local law." Despite the fact that appellant here is seeking a decision in conformity, from the practical point of view, with the decisions rendered in the *Mid America* case, *supra* (31 Fed. Supp. 601), the *Jersawit* case, *supra* (85 F. 2d 25), and with the numerous other cases cited in the reported Opinion below with reference to the impact of a state taxing statute in a field where the fed-

eral power to regulate is concededly supreme, the reported Opinion quotes from the *Davies* case the portion of that case with which we are entirely in agreement:

“. . . It is, of course, true that uniform operation of a federal law is a desirable end, and other things being equal we often have interpreted statutes to achieve it. But in no case relied upon did we achieve uniformity at the cost of establishing overlapping authority over the same subject matter in the state and in the Federal Government. When we do at times adopt for application of federal laws within a state a rule different from that used by a state in administering its laws, the two rules may subsist without conflict, each reigning in its own realm. It is a much more serious thing to adopt a rule of construction, which we are asked to do here, *which precludes the execution of state laws by state authority in a matter normally within state power.* . . .” (Emphasis added.)

It is emphasized at this point that the conclusion reached by the Judge below *does* preclude the execution of a valid state law by the duly constituted state agency charged with the enforcement thereof in a matter normally within the state power. Furthermore, it should be obvious at this point that appellant is not in any respect seeking to establish “overlapping authority” over the bankruptcy field where the federal power is supreme, but striving for the very uniformity favored by the United States Supreme Court.

The learned Judge below, in considering the California sales tax statute “as a whole,” fails entirely to distinguish between the sections imposing the tax and the means provided for collecting it. The District Judge overlooks entirely that appellant is not seeking (nor has it, at any



time since the adoption of the California sales tax in this state) to enforce collection in a manner not entirely in accord with well established principles, including those regarding assets *in custodia legis*.

We are also unaware of any authority for the proposition that the imposition sections of a taxing statute must fall merely because some of the collection procedures set up by the taxing statute cannot be applied in all cases.

Furthermore, the Opinion below disregards one of the means of collection provided for by the California Sales and Use Tax Law in Section 6711 thereof, and the provision of Section 959a, 28 U. S. C., and cases relating thereto. Section 6711 authorizes appellant to bring a court action for the collection of amounts due under the California Sales and Use Tax Law, and Section 959a provides that trustees may be sued without leave of the Court regarding any of their acts or transactions in carrying on business connected with property of the bankrupt estate. It is also too well established to warrant citation that in cases where a trustee in bankruptcy cannot be sued pursuant to Section 959a without consent of the bankruptcy court application may be made to the bankruptcy court for leave to maintain the suit.

Considering the foregoing, accordingly, it is clear that the application here of the principle that a statute must not be so construed in its entirety as to render it ineffective or inefficient is entirely without foundation.

Without a detailed analysis of the California sales tax statute, it is nevertheless clear that in its practical operation it calls for the imposition of the tax technically upon the seller, who may reimburse himself in full by collecting the amount of tax imposed upon him from his vendee, and for the collection of that amount from him by way of

suit with or without the bankruptcy court's permission as the case may be, if the trustee is not generally subject to all state taxing statutes by virtue of Section 960, 28 U. S. C.

In passing, we note at this point that the learned Judge below also misconstrued appellant's position regarding the \$1.00 permit fee requirement of the California Sales and Use Tax Law. Appellant does not contend that a trustee in bankruptcy who does not conduct a business within the purview of Section 960, 28 U. S. C., may be enjoined from, or prosecuted for, carrying out his liquidation duties if he does not obtain a California seller's permit. It is clear from a reading of Section 6066 of the California Sales and Use Tax Law that the permit requirement is a registration requirement, as was true in *O'Neil v. United Producers & Consumers Co-op.*, 57 Ariz. 295, 113 P. 2d 645, involving the Arizona Occupation Tax. It is obvious again that the registration character of the permit is not altered by the fact that various enforcement provisions (some of which may perhaps not be applicable to a trustee in bankruptcy engaged solely in a liquidation activity) are found in related sections of the California Sales and Use Tax Law.

We must emphasize again, inasmuch as it appears that a contrary impression was received by the Judge below, that appellant is not and has not at any time sought to interfere and/or restrict and/or hamper and/or inhibit in any manner whatsoever the performance of the duties imposed upon trustees in bankruptcy.

The conclusion reached by the Judge below at page 658 of the reported Opinion "that nearly every section of the sales tax provisions of said Law poses problems which not even the most practical approach could solve"

in light of the Bankruptcy Act, is predicated entirely upon the assumption that a taxing statute must fall if any of the enforcement provisions therein cannot be applied to every taxpayer thereunder. It is submitted that not a single authority can be found to support this conclusion.

**I. Compliance With the California Sales Tax Statute by Trustees in Bankruptcy Would Not Give Appellant a Priority Over Other Administrative Expenses.**

Commencing at the end of page 658 of his reported Opinion, the District Judge concluded that compliance by a trustee in bankruptcy with the provisions of the California Sales and Use Tax Law “would involve a priority for the State over other administrative expenses, such as compensation of counsel, etc.; . . .” The Learned Judge below was also fearful that such a priority would expose trustees in bankruptcy to the possibility of surcharge.

The fallaciousness of this reasoning is again demonstrated by reference to Section 6052 of the California Sales and Use Tax Law which authorizes the seller to collect the amount of tax, as we have pointed out above, from his vendees. Accordingly, as we attempted to impress upon the Court below, a trustee making liquidating sales in bankruptcy can inform his prospective vendees that they will be required to reimburse him for the California sales tax attributable to sales made to them and thereupon collect the amount of tax from each vendee when a sale is made. The tax reimbursement so collected, which does not constitute a portion of the bankrupt estate, can very simply be set aside in a separate fund and transmitted to appellant, together with the returns required by

the California Sales and Use Tax Law. No portion of the estate otherwise available for administrative expenses would be paid to appellant. And in cases where a trustee makes only one sale, but is not certain at that time whether he will make sales sufficient in scope and number to constitute him a retailer under the California Sales and Use Tax Law, it would be a simple matter to collect the reimbursement from the vendee pending its return to him if the amount collected were not thereafter payable under the taxing statute. It is submitted that the difficulties envisioned by the Judge below are truly ephemeral rather than real.

**J. Although the Term "Trustees" Rather Than "Trustees in Bankruptcy" Is Used in Section 959, 28 U. S. C., It Is Well Established That That Term Includes Trustees in Bankruptcy.**

Commencing at page 660, the reported Opinion again affirms that compliance with the applicable provisions of the California Sales and Use Tax Law by a trustee in bankruptcy will result in an interference by the state with the jurisdictional and administrative provisions of the Bankruptcy Act. We have attempted above to demonstrate that such interference would not exist.

The Court's attention is, however, directed to the paragraph which follows this additional reference to "interference" wherein the Judge below concluded that the addition of the word "trustee" to the definition of "person" in the California Sales and Use Tax Law was not motivated by the California Legislature's view that the levy of the California sales tax upon a trustee in bankruptcy for the privilege of performing mandatory functions had received implied sanction in language found in opinions

of the California and United States Supreme Courts. We are not able to so blithely conclude, especially in light of the numerous decisions cited in the Opinion below, and referred to herein above, regarding the impact of state taxing statutes in fields where the federal regulatory power is concededly supreme. We note further that Congress itself, in drafting legislation affecting trustees in bankruptcy, did not specifically refer to them as such, but, like the California Legislature, felt content to use merely the term "trustees." We will not burden this Court with a lengthy recital of all the cases holding that Sections 959 and 960, 28 U. S. C., and their predecessor sections apply to trustees in bankruptcy despite the fact that only the term "trustee" is employed in Section 959, and only the words "officers and agents" in Section 960.

### K. Miscellaneous Points in Sequence.

Commencing at page 661 of the reported Opinion below, various erroneous premises and conclusions discussed above are again reiterated.

The partial quotation from the decision in *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33, 48, 60 S. Ct. 388, 393, 84 L. Ed. 565, may possibly be misleading inasmuch as the case supports appellant's position rather than appellee's. In considering the application of the New York City sales tax, which, as we have pointed out above, is a consumer's sales tax as contrasted with the California tax, the application of the New York City sales tax to trustees in bankruptcy was upheld despite its impact on interstate commerce. The paragraph following

the portion quoted in the Opinion below contains reasoning which is equally applicable to the California sales tax, and reads as follows:

“The present tax as applied to respondent is without the possibility of such consequences [the dire consequences envisioned by the Judge below] Equality is its theme, . . . [citation]. It does not aim at or discriminate against interstate commerce. It is laid upon every purchaser, within the state, of goods for consumption, regardless of whether they have been transported in interstate commerce. Its only relation to the commerce arises from the fact that immediately preceding transfer of possession to the purchaser within the state, which is the taxable event regardless of the time and place of passing title, the merchandise has been transported in interstate commerce and brought to its journey’s end. Such a tax has no different effect upon interstate commerce than a tax on the ‘use’ of property which has just been moved in interstate commerce sustained in *Monamotor Oil Co. v. Johnson*, 292 U. S. 86, 54 S. Ct. 575, 78 L. Ed. 1141; [citations] . . .”

It is submitted that the foregoing reasoning is applicable here with respect to bankruptcy.

The decision cited at page 662 of the reported Opinion below, *United States v. Pyne*, 313 U. S. 127, 61 S. Ct. 893, 85 L. Ed. 1231, is not pertinent to any issue involved in this appeal inasmuch as that decision was concerned solely with a deduction provision in a Federal Revenue Act relating to the computation of taxable net income for federal income tax purposes. It will serve no purpose for counsel to strike off at a tangent at this point to discuss at length the development for federal

income tax purposes of the deduction for expenses incurred in connection with the carrying on of business.

The repeated reference to the decision of this Court in *State Board of Equalization v. Boteler, supra* (131 F. 2d 386), and to the decisions of the District Court in this jurisdiction in *In re California Pea Products, supra* (37 Fed. Supp. 658), and *In re Davis' Standard Bread Co., supra* (46 Fed. Supp. 841), calls for a reiteration of the fact that trustees in bankruptcy engaged in activities falling within the scope of Section 960, 28 U. S. C., have always been considered subject to the California Sales and Use Tax Law since its inception. Counsel for appellant can only state in all frankness that they are unable to comprehend how this long-continued construction was not taken into account by the Court in each of the foregoing decisions. If the Court's attention was directed to that long-continued and accepted construction, we are unable to explain how in the foregoing decisions, it could have been concluded that the trustee in bankruptcy was not within the purview of the California Sales and Use Tax Law and subject to tax thereunder.

#### **L. With Particular Reference to Administrative Construction.**

Commencing at page 664 of the reported Opinion, the learned Judge concludes that although it was appellant's administrative practice to treat persons making "two or more sales . . . in any taxable period" as retailers within the purview of the California Sales and Use Tax Law, if the sales are sales at retail, this administrative construction is worthless inasmuch as it was not incorporated into a formal printed ruling of the Board.

We are unaware of any authority supporting the proposition that the long-continued administrative practice of an agency charged with the enforcement of a particular statute is to be accorded no weight whatsoever in construing that statute, if the application of well established principles of construction are called for, merely because the practice is not evidenced by a formal, printed ruling. To the contrary, it appears that the California Supreme Court has taken a view opposed to the views of the District Judge in *Coca-Cola v. State Board of Equalization*, 25 Cal. 2d 918, 921, 156 P. 2d 1, 2, wherein the California Court states:

“Although not necessarily controlling, as where made without the authority of or repugnant to the provisions of a statute, the contemporaneous administrative construction of the enactment by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. (*Shealor v. City of Lodi*, 23 Cal. 2d 647 [145 P. 2d 574]; *People v. Southern Pacific Co.*, 209 Cal. 578 [290 P. 25]; *Riley v. Thompson*, 193 Cal. 773 [227 P. 772]; *Riley v. Forbes*, 193 Cal. 740 [227 P. 768].) . . .”

Proceeding from the assumption that appellant's long-continued administrative construction is of no value, as outlined in the preceding paragraph, the Judge below then concludes that the California Legislature did not intend to include trustees in bankruptcy within the definition of “person” by the addition of the word “trustee” to the definition of “person” in Section 6005 of the California Sales and Use Tax Law. Overlooked entirely is the fact that the term “trustee” and “officers and agents” are used



in Sections 959 and 960 of 28 U. S. C., and were so used in the predecessor sections thereof. Overlooked is the fact that Section 6005 does not specifically refer to receivers in bankruptcy but only to "receivers", although it has never been denied (but to the contrary always accepted) that that the term "receiver" includes a receiver appointed by a bankruptcy court. Additionally overlooked is the fact that the Federal bankruptcy courts in this State, since the inception of the sales tax in 1933, have always considered trustees in bankruptcy and receivers in bankruptcy who operate a debtor's or bankrupt's business to be subject to the provisions of the California sales tax statute, and, accordingly, "persons" within the purview of those statutes.

#### M. With Further Reference to the Referee's Jurisdiction.

Commencing at page 665, the Opinion below purports to consider the jurisdiction of a referee in bankruptcy to enjoin the collection of a valid state tax by the state agency duly charged with its collection. Overlooked entirely, as we have attempted to point out above, is the fact that appellant was not a party to the bankruptcy proceedings involving West Coast Cabinet Works, Inc., at the time the referee issued his Order, *ex parte*, peremptorily requiring appellant Board members to appear before him and show cause why they should not be enjoined from enforcing the California Sales and Use Tax Law against the trustee in bankruptcy herein (appellee), in connection with his activities. Erroneously assumed, again, is the proposition that compliance with the California Sales and Use Tax Law by appellee would have resulted in interference with the bankruptcy court's control over appellee's activi-

ties and the property in its custody. Overlooked, again, is the fact that compliance with the California Sales and Use Tax Law by a trustee in bankruptcy would not impair the priority of payment of administrative expenses provided for by the Bankruptcy Act. And all these matters are overlooked despite the fact that the Judge below recognized (reported Op. 666) that “the Board had filed no petition for the allowance of the tax as an administrative expense by the bankruptcy court . . . .”; and, strangely, this recognition is coupled with the erroneous statement that appellant had “threatened to enforce the provisions of the Law against the trustee and the estate of the bankrupt.”

### Conclusion.

We have attempted in Part II of the foregoing Argument to direct this Court’s attention to most of the erroneous premises and conclusions upon which the Order below was predicated, and rather than again enumerate the matters discussed above, as well as in the remaining portion of the District Judge’s Opinion (where, for example, the District Judge overlooks the 1947 amendment to the California Code of Civil Procedure, Section 401, which permits suits for refund of taxes paid under the California Sales and Use Tax Law to be brought in Los Angeles or San Francisco as well as in Sacramento), we respectfully request this Court to consider the errors discussed as additional specifications of error even though not specifically designated as such.

It is respectfully submitted that the Order below is erroneous in light of the facts established by the record herein and, additionally, that the Order below is errone-

ous even if it were properly predicated upon the factual situation set forth in the findings below.

In any event, the application of the California Sales and Use Tax Law to trustees in bankruptcy is a matter of great importance both in the administration of bankruptcy estates and the administration of the State taxing statute, and it is respectfully requested that this Court in its Opinion, regardless of whether it agrees with appellant's contention or not, fully dispose of all the doubts which have been created by the many misleading premises and conclusion in the Opinion below.

Respectfully submitted,

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